

## **Can the Jury Survive after the Judgment of the European Court of Human Rights in *Taxquet v. Belgium*?**

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It was Professor Damaška who introduced me to the American jury system in Salzburg at the summer seminar on American Studies in Schloss Leopoldskron almost forty years ago. Perhaps I may say that after his lectures I understood something about the American criminal justice and the common law type jury system which before appeared to me a somewhat exotic institution. But Professor Damaška not only made me understand the operation of American criminal justice but taught me to be cautious when making assertions about the sharp differences between the adversarial and the non-adversarial systems and suggested to rather search for the common objectives which are accomplished by different means in the two systems.<sup>1</sup>

Professor Damaška also contributed to gaining a more realistic and objective view of the inquisitorial process of the Middle Ages which generally is associated with cruelty and a complete disregard of principles that we today would term “due process guarantees”. He convincingly showed us that there had in fact been defense safeguards in the criminal process of the ancient regime too.<sup>2</sup> At the same time he suggested to review or at least to refine the popular opinion on the “superiority” regarding procedural safeguards of the law in England as practiced between the 13<sup>th</sup> and the 18<sup>th</sup> century. Among others he pointed to the testimonial and adjudicative functions, both performed by the same body, namely the self-informing jury<sup>3</sup> or that until the middle of the 18<sup>th</sup> century defendants were not permitted to be defended by counsel.<sup>4</sup>

Coming back to developments over the last decades it has become obvious that the differences between the Continental type process and the Anglo-American procedure are by far not as striking as commonly believed. It is suggested to take a more differentiated refined look at the institutions we find in the two systems and by this some traditionally shared assumptions primarily the inquisitorial-accusatorial dichotomy

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<sup>1</sup> See *Damaška*, Mirjan, *Evidence Law Adrift*, Yale University Press, 2013.

<sup>2</sup> *Damaška*, Mirjan, *The Quest for Due Process in the Age of Inquisition*, LX *The American Journal of Comparative Law* 920 (Fall 2012).

<sup>3</sup> *Ibid*, p. 937.

<sup>4</sup> *Ibid*, p. 939.

becomes weakened and prejudices may be eliminated. It is also attempted to identify those principles that are common in the inquisitorial and the accusatorial proceedings.

Spencer for instance, writes that commonly the accusatorial process is associated with oral and public proceedings while it is believed that the inquisitorial process is basically a secret procedure conducted in writing. In fact hearings on releasing the defendant on bail are public, the media however may not provide information of these hearings.<sup>5</sup> He also notes that the media in England is prevented from reporting incriminating evidence before the verdict is rendered. This follows from the presumption of innocence. However, following the first instance verdict the defendant becomes a convict even if the defense decides to appeal. On the Continent, on the contrary defendants lose their status as defendants only after the decision has become final. Therefore, the presumption of innocence seems to be better protected on the Continent in this respect.<sup>6</sup>

Summers, confining her review to Europe, identifies the values adopted in both systems on the basis of the procedural codes adopted in the 19<sup>th</sup> century, the jurisprudence of English Courts and the works of the most influential legal scholars of the century. The guiding principles recognized in both the accusatorial and the inquisitorial model are the separation of procedural functions, public and oral trial, the immediacy principle (*Unmittelbarkeitsprinzip*), judicial independence and impartiality.<sup>7</sup> One may argue that in spite of these common general principles the two systems may operate in different ways. However, if we accept that there is agreement on the fundamental principles, then the approximation or rapprochement of the two systems is by far not hopeless. And in fact the legislative changes that have occurred over the last decades show that the two systems have become closer to each other.

The demand for changes resulting in the rapprochement of the two models came from “inside”: It was the recognition of the deficiencies in one’s own system that induced the changes. But in reducing the differences also “external” factors played a considerable role not least the jurisprudence of the European Court of Human Rights (ECtHR or Strasbourg Court). I emphasize the judgments of the ECtHR because in some of them traditional, fundamental institutions have been questioned concerning their compliance with the requirements of a fair trial (article 6) enshrined in the European Convention on Human Rights (ECHR).<sup>8</sup>

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<sup>5</sup> *Spencer*, John R., Introduction, in Delmas-Marty, Mireille; Spencer, John R. (eds.), *European Criminal Procedures*, Cambridge University Press, 2002, p. 21.

<sup>6</sup> *Ibid.*, p. 23.

<sup>7</sup> *Summers*, Sarah J., *Fair Trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Hart Publishing, 2007, see Part One of the book.

<sup>8</sup> The European Convention on Human Rights entered into force on 3 September 1953. And article 6 includes the following: 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in

The decisions in which the Strasbourg Court using the objective test<sup>9</sup> found it incompatible with the right to an impartial tribunal, as enshrined in Art. 6. of the ECHR, that the investigating judge or a member of the indictment chamber (*chambre d'accusation*) sits on the trial bench<sup>10</sup> have accelerated the process in the course of which many countries have abandoned the institution of the investigating judge or reduced their competence (authority).

These decisions have questioned the validity of the assumption which served as the basis of introducing the institution of the investigating magistrate. The assumption was that placing the pre-trial stage of the process under judicial supervision is the guarantee of establishing the truth and of arriving at a just judgment. The judgments of the ECtHR have also questioned the validity of the assumption according to which judges be they investigating magistrates or members of the *chambre d'accusation* due to their training, their independence guaranteed by legislation, their moral integrity and their attitude acquired in the course of their professional socialization could preserve their impartiality even if they perform investigative functions in the pre-trial stage of the process.

Following the judgment in *Borgers* finding Belgium in violation of the equality of arms principle several states were forced to give up their traditional position on the status and procedural functions of the *procureur général* (*avocat général*) and make the necessary amendments.<sup>11</sup> Under Belgian law in force at the time of the Strasbourg

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the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>9</sup> See for instance *Demicoli v. Malta* [13057/87 (27/08/1991)] para. 93–99: “[...] according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. [...] it must be determined whether, quite apart from the judge’s conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.”

<sup>10</sup> *De Cubber v. Belgium* 9186/80 (26/11/1984); *Ben Yaacoub v. Belgium* 9976/82 (30/11/1987) (struck off the list judgment). The Commission in its Report delivered on 7 May 1985, concluded that the right to an impartial tribunal had been violated.

<sup>11</sup> *Borgers v Belgium* 12005/86 (30/10/1991).

judgment in the proceedings before the *Cour de Cassation* the *procureur général* following the parties made his arguments to which the parties had no opportunity to comment. The *procureur général* could also attend the deliberation of the *Cour de Cassation* without the right to vote. According to the Government, Belgian law was in line with the Convention since the *procureur général* unlike prosecutors acting before lower courts was not a party to the case. His role was to advise the court to provide help in drafting the judgment and contribute to the consistency of the court's case law. The Government also claimed that the impartiality of the *procureur général*'s department was guaranteed due to the "independence it enjoyed vis-à-vis the Minister of Justice."<sup>12</sup>

Also, the dissenters of the ECtHR invoked the quasi judicial function of the *procureur général* and noted that there is broad consensus as to the status and the position of the *procureur général* which is part of the legal tradition in Belgium. They claimed that the participation of the *procureur général* at the deliberation of the court does not jeopardize judicial independence and impartiality due to the traditions of the Belgian judiciary and that judges in the course of their studies and training acquire skills that make them unbiased decision makers.<sup>13</sup>

Judge Martens reminded his colleagues that not only Belgium but also other countries may be forced to amend the rules of procedure before the highest court should the Strasbourg court find a violation.<sup>14</sup> However the majority opined that fairness is a higher value than the interest in preserving tradition.

In 2009 the Strasbourg Court in the *Taxquet* judgment questioned one of the fundamental features of the jury system, notably the unreasoned verdict of the jury.<sup>15</sup> According to earlier Strasbourg jurisprudence the unreasoned verdict is not necessarily contrary to Art. 6 of the Convention (see e. g., the decision of the European Commission of Human Rights in the *Zarouali*-case<sup>16</sup>). The Court did not indicate unequivocally in *Taxquet* that the right to a fair trial is guaranteed exclusively through the reasoned judgment. It found a violation because the judge addressed but a few broadly formulated questions to the jury. Therefore, the defendant was not in a position to assess which evidence the jurors found to be decisive when convicting him. However, the Court noted that "according to its settled case-law judgments of courts and tribunals should adequately state the reasons on which they are based" adding that the "extent to which this duty to give reasons applies may vary according to the nature

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<sup>12</sup> Ibid, para. 23.

<sup>13</sup> See Judge's Cremona, Thór Viljalmsson, Martens, Pinheiro Farinha, Morenilla and Storme dissenting opinion.

<sup>14</sup> Judge Martens has mentioned France, Italy and the Netherlands in his dissenting opinion.

<sup>15</sup> *Taxquet v. Belgium* 926/05 (13/01/2009), Chamber Decision (Hereinafter: *Taxquet* judgment (2009)).

<sup>16</sup> *Zarouali v. Belgium* 20664/92 (29/07/1994).

of the decision and must be determined in the light of the circumstances of the case.”<sup>17</sup> The Strasbourg Court also noted that in the *Zarouali* and *Papon* cases<sup>18</sup> it found no violation “although the jury could answer only “yes” or “no” to each of the questions put by the President.” However, the precision of the questions “sufficiently offsets the fact that no reasons were given to the jury’s answers.”<sup>19</sup>

The Strasbourg Court thus ruled that the transparency of judgments and the fairness of the process can also be guaranteed by other means than the reasons given for the decision. Reading the passages of the judgment cited above, those who are in favor of maintaining the English or the Irish jury system in its present form may have felt relieved. In Ireland the trial judge gives instructions to the jury on all the legal issues, the principles of criminal law and the elements of the criminal offense the defendant is charged with. Trial judges would also give a summary of the evidence. They would also provide “special directions (if necessary) concerning the inherent dangers attached to certain type of evidence.”<sup>20</sup> Also in England and Wales the judges of the Crown Court give a detailed summary of the facts to the jurors and inform them of the law “applicable to those facts”.<sup>21</sup>

However par. 43 of the Chamber judgment in *Taxquet* seems to suggest, that the reasoned judgment has no alternative and that the provisions in Irish or English law do not sufficiently guarantee the fairness of the trial. The Strasbourg Court observes that since the *Zarouali* decision the case law has changed and in a number of Member States the relevant provisions have been amended. As to the changes in Strasbourg jurisprudence it is noted that “[...] the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness.”<sup>22</sup> From among the legislative changes in the Member States the Court made reference to France where jury verdicts can now be appealed and therefore the motives of the verdict have to be stated.

The inconsistency of the *Taxquet* judgment is also evidenced by the fact that courts in Europe drew different conclusions from it. In Belgium the Court of Assizes in Arlon concluded from *Taxquet* that juries are required to give reasons for their verdict

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<sup>17</sup> *Taxquet* judgment (2009), para. 40.

<sup>18</sup> *Papon v. France* 54210/00 (25/07/2002).

<sup>19</sup> *Taxquet* judgment (2009), para. 42.

<sup>20</sup> The Irish government has referred to this when they have presented their views in the *Taxquet* case as third parties. *Daly*, Tom, *An Endangered Species?: The Future of the Irish Criminal Jury System in Light of Taxquet v. Belgium*, 1 *New Journal of European Criminal Law* (2) 164 (2010).

<sup>21</sup> *Roberts*, Paul, *Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?* 11 *Human Rights Law Review* (2), 225 (2011).

<sup>22</sup> *Taxquet* judgment (2009), para. 43

by providing explanations for each of their answers.<sup>23</sup> This position was shared by the Central Criminal Court in Ireland in a widely publicized case.<sup>24</sup>

In Norway the Supreme Court drew a different conclusion from the *Taxquet* judgment. It held that the judgment does not indicate any departure from earlier case law, thus juries are not required to give reasons for their verdict. It pointed out that the cause for finding a violation in *Taxquet* was that the questions addressed to the jury by the president of the court were not sufficiently precise and detailed.<sup>25</sup>

Also, legal scholars commenting on the judgment came to different conclusions. In Decaigny's interpretation the judgment clearly puts juries under the duty to state the reasons for their verdicts in order to avoid arbitrariness.<sup>26</sup> Daly on the contrary concluded that such a duty does not necessarily follow from the judgment.<sup>27</sup>

Following the *Taxquet* judgment the Belgian law of criminal procedure was amended in order to ensure compliance with the ECHR, I will come back to this later.<sup>28</sup> At the same time the Government decided to refer the case before the Grand Chamber and the Governments of the United Kingdom, Ireland and France intervened as third parties. Roberts was right in noting that the third party intervenors "had more practical interest in the Grand Chamber's ruling than Belgium, the direct respondent to the application."<sup>29</sup>

In Ireland the Constitution guarantees the defendant's right to be tried by jury.<sup>30</sup> The constitutional elements may not be amended by a "simple" law of Parliament and

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<sup>23</sup> *Daly*, p. 161.

<sup>24</sup> *Director of Public Prosecutions v. Eamonn Lillis*, Central Criminal Court Record, No. 32/09, (05.02.2010)

<sup>25</sup> *Daly*, pp. 161–162; According to Decaigny, several Belgian courts concluded from the *Taxquet* judgment that the jury is under the obligation to give reasons for their verdicts and tried to comply with this requirement. *Decaigny*, Tom, Can Juries Convict in Accordance with the European Convention on Human Rights?, 1 New Journal of European Criminal Law (1) 12 (2010).

<sup>26</sup> *Decaigny*, p. 10.

<sup>27</sup> *Daly*, p. 163.

<sup>28</sup> Already before the *Taxquet* judgment a Bill was prepared in 2008 which among others stated that the Assize Courts have to give reasons for their decisions. It also permitted the president of the Court to be present at the jurors' deliberation and assist them. The Assize Court Reform Act of 2009 which provided that Assize Courts must state the main reasons for their decisions came into force on January 11, 2010. See. *Taxquet v. Belgium* 926/05 (16/11/2010), Grand Chamber Decision (Hereinafter: *Taxquet*-judgment (2010)), paras. 35–36.

<sup>29</sup> *Roberts*, p. 217.

<sup>30</sup> Exceptions are known: "(i) minor offences may be dealt with by a judge sitting without a jury, (ii) offences under military law may be tried by military tribunals sitting without a jury, (iii) special courts may be used to try offences without a jury where the ordinary courts are deemed inadequate secure to secure the effective administration of justice, and the preservation of public order." (*Daly*, p. 154). The Belgian Constitution of 1831 provided serious crimes, political and press offences are tried by juries. We find a similar provision in the 1994 Constitution: "The jury shall be constituted for all serious crimes and for political and press

the secrecy of the deliberations and the ban on giving information on the deliberation after the trial has been concluded, are among the constitutional elements of the jury system. Also in England the secrecy of the deliberations is sacrosanct and inviolable and a legal provision obliging jurors to give reasons for their verdicts would abandon the principle.

The Grand Chamber agreed with the Chamber, in its unanimous judgment it found a violation of Article 6 of the ECHR.<sup>31</sup> However those who were anxious about the future of the *common law* type jury might have felt relieved.<sup>32</sup> Invoking its previous judgments it noted that jurors are not required to give reasons and that “article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict.”<sup>33</sup>

The ECtHR noted that it has no power to review how member states shape their system of the administration of justice. It also observed that in numerous member states of the Council of Europe the jury system exists in different forms depending on the “history, tradition and legal culture” of the states.<sup>34</sup> The Court’s position is that the institution of the jury may not be called into question. It is for the Contracting States to decide how to ensure the operation of their justice systems in compliance with Article 6 of the Convention.<sup>35</sup> The Grand Chamber made it clear that it follows its previous jurisprudence and that Article 6 is not necessarily violated if jurors give no reasons for their verdict.<sup>36</sup>

In his concurring opinion judge Jebens noted that the solutions adopted in various jurisdictions with the aim to bring the jury system in line with the duty to give reasons for the verdict do only formally comply with this requirement but in fact do not guarantee defendants’ right to be informed of the real reasons for their conviction. He mentioned the legislative amendment in Belgium adopted in January 2010 after the Chamber judgment in *Taxquet*. According to the amendment the judge and the jurors formulate the judgment together. Decaigny rightly raises the question if the professional judge would be willing to write down the actual reasons “if those reasons

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offences, except for press offences motivated by racism and xenophobia.” (*Taxquet* judgment (2010), par. 23). Also in Spain trial by jury was elevated to the rank of a constitutional right in 1978 (see Article 125 of the Constitution).

<sup>31</sup> *Taxquet* judgment (2010).

<sup>32</sup> However, according to some authors, certain passages of the Grand Chamber judgment seem to suggest that in the long run the jury system in its present form may not be maintained. The *Taxquet* judgment therefore “prompts broader critical reflections on the rationality and legitimacy of unreasoned jury verdicts in criminal adjudication”. See *Roberts*, p. 213.

<sup>33</sup> *Taxquet* judgment (2010), para. 90.

<sup>34</sup> *Ibid*, para. 83.

<sup>35</sup> *Ibid*, para. 84.

<sup>36</sup> *Ibid*, para. 90.

would jeopardize the legality of the decision”, for instance if the real motive of conviction was the racial attitude of the jurors.<sup>37</sup>

In Norway the Supreme Court in exceptional cases may instruct the High Courts to indicate the evidence that was decisive for the defendant’s conviction. This is to be given by the judges without the participation of the jurors.<sup>38</sup> Since the judges are not present at the deliberation of the jury it is highly questionable if the reasons given reflect the opinion of the jurors.

I note that in 1996 legislators in Geneva adopted a similar solution: the law required jurors to give reasons for their responses to the questions addressed to them but allowed them to seek the assistance of the *greffier* in formulating their reasons. On the basis of the explanation of the jurors the professional bench drafted the reasons for the judgment.<sup>39</sup>

In sum we may have serious doubts if the jury system can be reformed to guarantee the defendant’s right to a reasoned judgment. This right is guaranteed only if the defendant is informed about the genuine motives of the verdict. On the basis of the legislative attempts he described, judge Jebens concludes that with a view to the particularities of the jury system the fairness of the trial can be guaranteed through other mechanisms that compensate for the absence of the reasons.

The fact that the defendant and the community are not informed of the real motives of the decision is all the more disquieting since following the verdict it is prohibited to conduct any inquiry in order to reveal what actually happened in the course of the jurors’ deliberation. This rule of course has its justification. The prohibition may ensure the open discussion of the jurors, it may protect them from eventual criticism or retribution if they happened for instance to acquit a defendant charged with a serious crime that provoked a public outcry. But because of the secrecy of the deliberations it can never be disclosed if the decision was rendered via coin-toss or some sort of magic. It can never be revealed if jurors were motivated by racist attitudes. Therefore, it cannot be ascertained if the defendant’s right to an impartial tribunal as set forth in Article 6 of the ECHR was guaranteed.<sup>40</sup>

By briefly summarizing the *Taxquet* judgments my primary intention was to demonstrate that the judgments of the ECtHR may induce member states to review traditional institutions the justification of which has not been questioned beforehand by

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<sup>37</sup> Decaigny also notes that “this praetorian method” could not guarantee the rights of victims and the public, since in case of an acquittal the reasons are not registered. *Decaigny*, pp. 12–13.

<sup>38</sup> See Judge Jebens parallel reasoning in the *Taxquet* judgment (2010).

<sup>39</sup> *Thaman*, Stephen C., Should Criminal Juries Give Reasons for Their Verdicts: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*, 86 *Chicago-Kent Law Review* 627 (Issue 2).

<sup>40</sup> For deep analysis of the question see *Quinn*, Catherine, Jury Bias and the European Convention on Human Rights: A Well-kept Secret?, *Criminal Law Review* 998–1014 (December 2004).



this contributing to the approximation of legal systems. However, I cannot resist the temptation to go on with the inquiry into the jury system. The reason is, that it calls for an explanation why member states took legislative measures to put the obligation on juries to give reasons for their verdicts, whereas as we saw it this is hardly compatible with the particularities of the jury system and is not required by the case law of the ECtHR either. Already in the 1990 s the ECtHR and the European Commission of Human Rights that existed prior to reform of the Convention system through Protocol 11, took the position that Article 6 of the ECHR does not require that jurors state the reasons for their verdicts and this was confirmed by the *Taxquet* judgment.<sup>41</sup>

In *Taxquet* the ECtHR even made proposals on how to guarantee the transparency of the decision making process in the jury system and how to avoid the risk of arbitrariness which in trials conducted by professional judges is served by the duty to give reasons. According to the ECtHR defendants' right to be informed of the motives behind their conviction can be guaranteed if the professional judge gives clear guidance and puts precisely formulated questions to the jurors. By this the arbitrariness of the decision can be avoided.<sup>42</sup>

In spite of this, as we saw, legislators in some member states thought that compliance with the ECHR may be ensured only by putting the obligation on jurors to state the reasons for their decisions. Legislators perhaps saw a certain contradiction in that the ECtHR first formulated the right to a reasoned judgment as an implied component of the right to a fair trial<sup>43</sup> and then proclaimed that this right does not have to be guaranteed in jury trials.

Of course both the explicit (the right to counsel, the right to confront witnesses) and the implied components (equality of arms, the right to silence or the right to a reasoned judgment) of the right to a fair trial can be restricted in the name of another right or interest. The right to confront witnesses or the right to silence for instance may be restricted but this can occur only on the condition that other safeguards provide adequate guarantees for preserving the overall fairness of the proceedings.

True, the ECtHR is more willing to accept the limitation of the implicit rights. This follows from the nature of implied rights since it is the Court that designates the scope of the given right and thereby also its inherent limits.<sup>44</sup> However, both the explicit and implied components are unqualified rights such as the right to a fair trial itself. In contrast to the so called qualified rights (freedom of expression, freedom of association, freedom of assembly etc.) where the permissibility of restriction is explicitly mentioned, in the Convention a total deprivation cannot be compatible with the

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<sup>41</sup> For the presentation of the case law see the *Taxquet* judgment (2010), para. 85–91.

<sup>42</sup> *Ibid*, para. 92.

<sup>43</sup> See for example *Van de Hurk v. Netherlands* 16034/90 (19/04/1994).

<sup>44</sup> *Bárd, Károly*, Fairness in Criminal Proceedings: Article Six of the European Human Rights Convention in a Comparative Perspective, Budapest, Hungarian Official Journal Publisher, 2008, pp. 58–61.

ECtHR: it is unacceptable that anyone should be deprived of his/her right to a fair trial in the name of any other right or interest.

This is not the case with the qualified rights. Persons, who for national security considerations, are interdicted from disseminating their writing or who are punished for inciting to violence through their speech can rightfully claim that in the given case they were deprived of their freedom of expression (they cannot claim, however, that they are the victims of a human rights violation).

In contrast, there is no situation in which the right to a fair trial would have to back down before another right or interest, without this constituting a human rights violation. This can clearly be explained by the fact that the right to a fair trial is composed of numerous – explicit and implicit – elements, which themselves are not clearly defined, and that the Strasbourg Court always evaluates the entirety of the given proceeding. The limitation of individual components does not necessarily render the whole trial unfair as other elements may compensate for the deficiency. But as no such exception can exist that would make an unfair proceeding acceptable, no trial in which the accused was – in the name of another right or interest – totally deprived of a component of the right to a fair trial can be compatible with the Convention.

Now it seems that the ECtHR stated the contrary when ruling that the right to a fair trial is not violated if the jury fails to give reasons for its verdict. However, the Court did not make reference to any other right or interest that would make the total deprivation of defendants of their right to a reasoned judgment acceptable in jury trials. Perhaps the explanation lies in that the right to a reasoned judgment is purely instrumental. As the Court observed by giving reasons the risk of arbitrariness can be avoided<sup>45</sup> and this is the precondition for the community's trust in the fair operation of the criminal justice system.

Further, the reasoned judgment is the precondition of the effective exercise of the right to appeal.<sup>46</sup> By stating the reasons for their decisions courts give an account of the intellectual process that made them arrive at the given conclusion. Being informed of the reasons the defense is given the opportunity to draw the appellate court's attention to the deficiencies in this intellectual process. And the reasons may disclose before the appellate court the factual and legal mistakes made by the first instance court even without the initiative of the defense.

And finally stating the reasons for the judgment is the precondition of judicial impartiality. As noted by Theodor Meron: "judicial impartiality cannot be ensured with-

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<sup>45</sup> *Taxquet* judgment (2010), para. 92.

<sup>46</sup> *Harris*, David; *O'Boyle*, Michael; *Bates*, Edward P; *Buckley*, Carla M., *Law of the European Convention on Human Rights*, 2<sup>nd</sup> ed., Oxford University Press, 2009, p. 268. In criminal matters the right to appeal is included in Protocol No. 7, article 2 of the ECHR.

out a reasoned decision. Giving clear reasons for a judgment and bringing to light the judge's reasoning process are essential safeguards against judicial wrongdoing."<sup>47</sup>

If the right to a reasoned judgment is in fact instrumental then we may comprehend why the ECtHR is prepared to accept that defendants may completely be deprived of this right which is formulated as an implied component of the right to a fair trial. If namely we can demonstrate that in the case that there have been other instruments that serve the same purposes (excluding arbitrariness and by this ensuring the community's confidence in the administration of justice, guaranteeing the effective exercise of the right to appeal and judicial impartiality) as the right to a reasoned judgment, then we may state that there is no need for that right.

As to creating and maintaining trust in the administration of justice we may say that in trials conducted by professional judges stating the reasons for the decision has no alternative. However, the jury was born exactly out of distrust towards the professionals or to use a positive formulation out of the trust in the laymen, our peers, who are like us. The jury is legitimized not by its rational way of procedure but by its composition and that it applies the norms shared by the community. It is the jury itself that is the basis of the trust.

The statement of reasons for the judgment, as we saw, serves also the effective exercise of the right to appeal. In the common law system, exactly because of the absence of the jury's duty to state the reasons for the verdict, the appeal court is rather limited in reviewing the substantive correctness of the decision. However, the assumption is that compliance with the procedural rules may guarantee that the jury arrives at the correct decision. Adherence to the procedural rules can easily be ascertained since all that happens in the course of the trial is documented in details, witness statements are recorded verbatim.

Stating the reasons for the decision is also the guarantee of judicial impartiality. The mere fact that judges know that they are under the obligation to give an account on how they arrived at a certain conclusion encourages judges to proceed without bias. In jury trials it is not the duty to state the reasons for the decision but the process by which jurors are selected that serves as the guarantee of judicial impartiality. Both the prosecution and the defense may challenge a certain number of potential jurors without even giving reasons (peremptory challenge). After using the peremptory challenges the parties have the opportunity to subject other potential jurors to intensive interrogation and if they find that some of them may not be expected to deal with the case without prejudice they may initiate their disqualification.<sup>48</sup> Thus, it seems that in the jury system there are institutions, "instruments" in place that serve the

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<sup>47</sup> *Merón*, Theodor, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 *American Journal of International Law* 360 (2005).

<sup>48</sup> Another method to ensure impartiality is the change of venue in especially sensitive cases. See *Jackson*, John D., *Making Juries Accountable*, 50 *American Journal of Comparative Law* 481 (2002).

same purposes as the right to a reasoned judgment. However, a deeper analysis is needed in order to confirm the correctness of this assertion.

First, we may question the validity of the starting thesis, i.e., that the right to a reasoned judgment is purely instrumental. According to Roberts “providing reasons for decision is a basic tenet of rationality in decision-making with both instrumental and intrinsic values.”<sup>49</sup> The pressure to provide reasons is instrumental in that it is likely to lead to higher quality decisions. But it also has intrinsic value in that it guarantees respect for human dignity. If it is explained to an individual why she/he has been treated in a certain way and has the opportunity to contradict and present reasons for reconsideration they are treated as autonomous, “sovereign agents, and not merely as an object who can be manipulated at the will of the authorities.”<sup>50</sup>

True, an argument in support of the jury is that it has an autonomous value. The jury system is the reflection of democratic values in the administration of justice. According to Devlin “each jury is a little parliament,” and “is a symbol of participatory democracy.”<sup>51</sup> However, most authors conclude from this declaration that the jury is rather instrumental: the participation of laymen makes the impression in people and especially in the jurors themselves that justice is administered fairly. Jurors usually believe that they have performed well and they are generally satisfied with their own performance and are sent back “to their ordinary lives with a sense of the fairness and propriety of the judicial process.”<sup>52</sup> Thus the jury system is instrumental in the sense that it strengthens the confidence in the justice system. But even if we accept that the jury system has an autonomous value, the same is the case with the duty to give reasons for the decision. By putting the duty on the judges to give account of the reasons we recognize defendants as autonomous subjects.

A further question is whether today, when besides the independence also the accountability of judges is stressed, the mere fact that defendants are tried by their “peers” serves as a sufficient basis for the trust in the justice system. We may argue that the era of “*khadi justice*” is over.<sup>53</sup> We are not anymore willing to accept

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<sup>49</sup> Roberts, p. 215. At the same time the right to a reasoned judgment may also in this context be considered as instrumental that can be substituted by other institutions. The adversarial nature of the process which enables defendants to submit their arguments and to question the credibility of incriminating evidence or the judge’s summary and his/her instructions addressed to the jurors on how they should proceed guarantee that defendants are treated as subjects.

<sup>50</sup> Ibid.

<sup>51</sup> Devlin, Patrick, Trial by Jury, Stevens & Sons, London, 1956, p. 164, quoted in *Darbyshire*, Penny, The Lamp that Shows that Freedom Lives – Is it Worth the Candle? Criminal Law Review 745 (October 1991).

<sup>52</sup> *Darbyshire*, pp. 745–746. *Darbyshire* at the same time notes that many people try to avoid jury service. And many of those who do not, report that the trial was boring and feel frustrated. Ibid., 746.

<sup>53</sup> According to Weber, trial by jury is frequently *khadi-* justice. Weber, M., Economy and Society, (Ed. by Guenther Roth and Claus Wittich), University of California Press, 1978, p. 813.

adjudication according to judges' instincts: we demand that they give an explanation for their decision.

We may of course argue that the *khadi's* decision is legitimized by the charismatic character of the juridical prophet, whereas the verdict of the jury appears to be the outcome of collective deliberation in the course of which jurors try to convince each other through presenting rational arguments. If the size of the jury is sufficiently large and unanimity is required we rightly may assume that the verdict is based on rational considerations and this may induce confidence in the justice system. However, since the end of the 20th century the defendant can be convicted both in Ireland and in England if at least ten out of the twelve jurors find his/her guilt to be proven provided that the jury tried to reach a unanimous verdict deliberating at least for two hours.<sup>54</sup>

Research indicates that if the agreement of a majority is sufficient for the decision jurors attempt to arrive at a verdict within a short period of time and their goal "centers on arriving at a verdict category and fashioning a story to justify the decision afterwards."<sup>55</sup> In contrast, if unanimity is required jurors will thoroughly analyze and discuss the evidence and attempt to persuade those who have not yet formed a firm opinion in order to ensure unanimity.<sup>56</sup>

The confidence in the jury and the correctness of its verdict is weakened also by the fact that it is almost impossible to set up a jury representing all sections of the community. Random selection does not guarantee representativeness. As Darbyshire puts it "Random selection may throw up juries which are all male, all Conservative all white."<sup>57</sup>

The jury was born out of the distrust towards the professionals and the general verdict that contained no reasons provided protection for the jurors against the pressure of the professional judge or public opinion. Therefore, the general verdict was a guarantee of the jurors' independence. In addition, the jury by applying the norms shared by the community and not being under pressure to give reasons could correct unjust and draconian laws.

Today professional judges are perhaps less abhorred than earlier and criminal laws are certainly swifter than two or three centuries before. Therefore, several authors

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<sup>54</sup> See *O'Hanlon*, R. J., *The Sacred Cow of Trial by Jury*, in: Brooks, Thom (Ed.), *The Right to a Fair Trial*, Farnham-Burlington, Ashgate, 2009, p. 7.

<sup>55</sup> *Brooks*, Thom, *The Right to Trial by Jury*, in: Brooks, Thom (Ed.), *The Right to a Fair Trial*, Farnham-Burlington, Ashgate, 2009, p. 87.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Darbyshire*, p. 745. This can be corrected by challenging some potential jurors. However, the parties' aim is not to have a representative jury to be set up but rather a decision making body which is likely to rule in their favor. It should be noted that in earlier times the jury was even less representative. In 1956 Lord Devlin observed that the majority of the jurors were middle aged, middle class men and since they shared certain values it was relatively easy to reach unanimity. Cited by *O'Hanlon*, p. 6.

question the jury's right recognized exclusively in the common law system to ignore the law and substitute it for their conscience (jury nullification). As Darbyshire points out it is for the elected Parliament and the Law Lords to re-write the laws.<sup>58</sup>

According to O'Hanlon putting laws aside may be justified in oppressive and autocratic regimes but is "indefensible in a modern democracy where fundamental rights and freedoms are protected by the country's constitution."<sup>59</sup> The members of the jury, he writes, "take an oath that they will deliver true verdicts according to the evidence" will break their oath "by refusing to give effect to the law of the land".<sup>60</sup> Juries "have usurped the role of parliament which is entrusted by the people with the task of making laws which are in conformity with the will of the people."<sup>61</sup>

The argument in support of jury nullification that the law may be put aside in order to enforce community norms is less convincing today since in less homogeneous societies we hardly can speak of commonly shared community values.<sup>62</sup> It is worth noting that also Lord Justice Auld in his review of the criminal courts in England and Wales<sup>63</sup> draws attention to the contradiction that on the one hand jurors take the oath to apply the law but on the other may acquit or convict "in defiance of the law and in disregard of their oath".<sup>64</sup>

Lord Justice Auld makes the proposal to prohibit juries by statute to acquit defendants by disregarding the law or the evidence presented.<sup>65</sup> Should his proposal appear too radical he suggests as an alternative to acknowledge openly the jurors' right to put aside the law. The judge would instruct jurors that they may decide according to their conscience and are not obliged to render a verdict of guilt if they disagree with the law or find the prosecution unfair. This solution would be more honest and would solve the contradiction that jurors take the oath to apply the law but may ignore it. As examples Lord Auld refers to the Constitutions of Indiana and Maryland, which confer upon the jury the right to determine not only the facts but also what the law is.<sup>66</sup>

At the same time numerous lawyers in the United States question the right of the jury to disregard the law. Some judges disqualify those jurors who are in favor of

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<sup>58</sup> *Darbyshire*, p. 750.

<sup>59</sup> *O'Hanlon*, p. 14.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Jackson*, p. 479.

<sup>63</sup> Review of the Criminal Courts of England and Wales 2001. The report was prepared upon the request of the Lord Chancellor, the Home Secretary and the Attorney General): <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/ccr-00.htm> (Hereinafter, *Auld*, Review).

<sup>64</sup> *Auld*, Review, Chapter 5: Juries, para. 105.

<sup>65</sup> *Ibid.*, para. 107.

<sup>66</sup> *Ibid.*, para. 108.

“jury nullification” and conduct an inquiry if they receive information of the jury’s intent to decide against the law.<sup>67</sup>

Judicial independence and impartiality are frequently invoked to justify that juries are not under the obligation to give information of the motives of their decisions. It is in the name of independence and impartiality that no one may inquire after verdict of the reasons for the decision.<sup>68</sup>

However, we tend to reassess the relation between independence and accountability. We believe that accountability does not curtail independence but the two complement each other. Independence means that judges subject themselves exclusively to the law and by making them accountable we wish to ascertain that they in fact subjected themselves to the law and have not disregarded it. True, the common law jury is not obliged to subject itself to the law but as indicated earlier the justification of jury nullification has been questioned in recent times exactly in the name of accountability. Also, Lord Auld makes the proposal to empower the appellate court to conduct an investigation on what has happened during the jury deliberation if the suspicion of some impropriety arises.<sup>69</sup>

Regarding the requirement of impartiality there may be doubts if the process of the selection of jurors provides sufficient guarantee. In England since 1988, when the right of challenging jurors without assigning a reason for challenge (peremptory challenge) was abolished, the parties have less influence on the composition of the jury. Where the institution of peremptory challenge still exists,<sup>70</sup> it is very likely that a non-representative jury will set up which may raise doubts on its impartiality or at least make it appear to be biased. In the United States prosecutors and defense councils employ refined methods of subjecting prospective jurors to examination interrogating. Their aim is not only to disqualify individuals who are likely to be hostile to the defendant or the victim but to ensure that a jury is set up which will probably decide in their favor.<sup>71</sup> In addition, in the United States the institution of peremptory challenge still exists and with some exaggeration we may say that the outcome of the

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<sup>67</sup> *Jackson*, p. 481.

<sup>68</sup> In England, according to section 8 of the 1981 Contempt of Court Act it is contempt to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. The position of the House of Lords is that not even senior Court of Appeal judges, may inquire after verdict into allegations of jury bias even when there is a possible miscarriage of justice. *R. v. Mirza (Shabbir Ali)* [2004] UKHL 2, 1 A.C. 1118. Quoted by *Thornton*, Peter, 50th Anniversary Article. Trial by Jury: 50 Years of Change, *Criminal Law Review* 689 (September 2004). The secrecy of jury deliberation was seen also as a guarantee of ‘frank discussion and expression of views’ (see *Brooks*, p. 91).

<sup>69</sup> *Auld*, Review, para. 98. This of course would call for the amendment of Article 8 of the 1981 Contempt of Court Act.

<sup>70</sup> Like in Ireland or in the United States of America.

<sup>71</sup> This was observed already by Devlin in his work published in 1956 (Trial by Jury), cited by *O’Hanlon*, pp. 13–14.

case is not determined by the cogency of the arguments put forward by the parties, but rather by their skills that enable them to have a jury set up which will rule in their favor, that is a biased and not impartial jury.<sup>72</sup>

Finally, we may doubt if in the absence of reasons the verdict of the jury may be challenged only the ground of procedural deficiencies the right to appeal as set forth in Protocol No.7 to the ECHR really guaranteed. According to Article 2 of the Protocol “everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.” It seems that the legislators in the United Kingdom also had doubts and that is why the UK not only failed to ratify but even refused to sign Protocol No. 7.<sup>73</sup>

It should be noted however, that in England and Wales the appellate judges may in principle in addition to procedural irregularities annul the jury’s verdict if for some other reason they think that the defendant’s conviction was wrongful. At the same time this rarely happens if the defense cannot refer to any procedural defect in the trial.<sup>74</sup> Also in Ireland the defense may appeal against the guilty verdict on grounds other than procedural irregularities as well. However, Daly notes that “the scope of appeal is narrowed by the lack of a reasoned verdict and the reluctance of courts to pierce the veil of secrecy covering jury deliberations, even when significant juror misbehavior is alleged.”<sup>75</sup>

In spite of this the scope of appeal is still broader in England and in Ireland than in Belgium where ordinary appeal is not provided against the verdict of the jury<sup>76</sup> and the Court of Cassation deals exclusively with points of law. According to Art. 352 of the Belgian Code of Criminal Procedure the professional judges shall stay proceedings and adjourn the trial if they are unanimously persuaded that jurors have made a substantive error without violating the rules of procedure. Should they decide so, the case will be considered by a new jury. However, as admitted by the Belgian government in *Taxquet* this option “has been used on only three occasions”.<sup>77</sup>

In my paper I attempted to assess if there are in fact inconsistencies in Strasbourg jurisprudence and in the *Taxquet* judgments regarding the right to a reasoned judgment. In its earlier decisions the Court ruled that the right to a reasoned judgment is an implied component of the right to a fair trial and then in the context of jury trials it held that no reasons have to be given. Also in *Taxquet* the Court at some points stated

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<sup>72</sup> For an insightful presentation of the jury selection process in the United States of America, see *Fletcher*, George P., *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial*, The University of Chicago Press, 1990, pp. 84–99.

<sup>73</sup> The Protocol has not been ratified by Germany, the Netherlands and Turkey either, but the UK is the only State Party which has not even signed it, indicating that she is not prepared to accept the binding effect of the Protocol.

<sup>74</sup> *Roberts*, p. 224.

<sup>75</sup> *Daly*, p. 164.

<sup>76</sup> This was the rule also in France until 2000. See *Roberts*, p. 224.

<sup>77</sup> *Taxquet* judgment (2010), paras. 31 and 99.



that juries are not required to give reasons for their verdicts but indicated that reasoning is essential to the quality of justice and is a safeguard against arbitrariness.

The right to a fair trial is an unqualified right as are the components, be they explicit or implied. This means that unlike in the case of qualified rights such as freedom of expression, association, or the right to private life, a total deprivation of the right is unacceptable. There can be restrictions on the components of the right to fair trial, but the total deprivation is contrary to the Convention.

However, the *Taxquet* judgment suggests that the right to a reasoned judgment can be completely abandoned. In order to explain the position of the Court I set out from the assumption that contrary to other fairness rights, such as the right to counsel, the right to be informed of the charges, etc. the right to a reasoned judgment is instrumental.

The reasons given for the judgment serve first as a guarantee against arbitrariness which is a precondition of creating and maintaining trust in the administration of justice. The reasons may reveal the deficiencies of the fact finding process or in the application of the law to the facts established which is, in turn, a precondition for the effective exercise of the right to appeal. I argued that in case there are other institutions in the jury system through which these aims can be accomplished then there is no need for juries to give reasons for their verdicts.

The first round of the inquiry seemed to suggest that there are in fact “instruments” in the common law jury system through which the objectives to be served by the reasoned judgment can be accomplished. However, a more in depth analysis raised doubts regarding the alternatives to a reasoned judgment that could ensure the fairness of the trial. Thus, in the light of the *Taxquet* judgment the fate of the common law jury is still uncertain.

